

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

SUSANNA MIRKIN and BORIS MIRKIN,  
Individually and on Behalf of All Others  
Similarly Situated,

Plaintiffs,

v.

XOOM ENERGY, LLC and XOOM ENERGY  
NEW YORK, LLC,

Defendants.

No. 18 Civ. 2949 (ARR) (JAM)

**DECLARATION OF MICHAEL D. MATTHEWS, JR. IN OPPOSITION TO  
PLAINTIFF’S MEMORANDUM OF LAW ON CONTINUED CLASS TREATMENT**

Michael D. Matthews, Jr., under penalty of perjury, declares as follows:

I am a partner of the law firm McDowell Hetherington LLP, attorneys for Defendants XOOM Energy, LLC and XOOM Energy New York, LLC. I submit this Declaration in opposition to Plaintiff’s memorandum of law as to whether or not classwide proceedings remain viable.

1. Annexed hereto as **Exhibit 1** is a true and correct copy of an email I received from Plaintiff’s counsel on March 26, 2024 with an attached “Proposed Revised Pretrial Schedule Draft.” It was through that attachment that XOOM first learned of Plaintiff’s intent to submit a new expert report.

2. Annexed hereto as **Exhibit 2** is a true and correct copy of an email that XOOM’s counsel sent to Plaintiff’s counsel on March 26, 2024 following the parties’ discussions regarding Plaintiff’s “proposed supplemental report [that] would not only update the existing damage model to account for new data but also would include a new methodology and opinions not previously disclosed . . . .”

3. Annexed hereto as **Exhibit 3** is a true and correct copy of relevant excerpts from the November 8, 2022, deposition of Seabron Adamson.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 1, 2024.

A handwritten signature in black ink, appearing to read "Michael D. Matthews, Jr.", written over a horizontal line.

Michael D. Matthews, Jr., Esq.

# EXHIBIT 1

**From:** [Ethan Roman](#)  
**To:** [Diane Wizig](#); [Matt Matthews](#); [Netra Sreeprakash](#)  
**Cc:** [Burkett McInturff](#); [Steven Wittels](#); [Andrey Belenky](#)  
**Subject:** Mirkin v. XOOM - 3.26 Meet & Confer  
**Date:** Tuesday, March 26, 2024 9:04:13 AM  
**Attachments:** [image001.png](#)  
[Mirkin v. Xoom - Proposed Revised Pretrial Schedule Draft 3.26.24.docx](#)

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Diane & Matt –

On today's meet and confer, we would like to discuss a revised schedule.

For Defendants' decertification motion, we are jammed up and would like one extra week to respond, moving the deadline to April 5. We are amenable to the same extension for Defendants' reply, moving that deadline to April 26.

For the pretrial schedule, analyzing Defendants' March 1 data production and preparing for last week's settlement conference took substantially more work than anticipated. We therefore would like to request that the Court extend the deadline to file the pretrial order to July 26. Both parties and the Court would benefit from building in that additional time to crystalize the parties' disputes and ensure there is enough time to complete everything required for the pretrial order. A proposed revised schedule for the parties to complete the various pretrial tasks is attached with the July 26 date in mind.

We can use the following dial-in for today's call:

Dial-in Number: (267) 930-4000;

Participant Access: 094-032-726

Best,

Ethan

**Ethan D. Roman**

WMP | Senior Associate

305 Broadway, 7th Floor | New York, NY 10007

Phone: 914 775 8862 x106

**Wittels  
McInturff  
Palikovic**

**Mirkin et al v. XOOM Energy, LLC et al (EDNY 1:18-cv-02949-ARR-JAM)**  
**Pretrial Schedule**

Date	Activity
<del>March 29</del> <u>April 5</u> , 2024	<b>Both Parties</b> <ul style="list-style-type: none"> <li>• Objections to witnesses</li> <li>• Objections to deposition designations</li> <li>• Deposition cross-designations</li> <li>• Objections to exhibits</li> <li>• Rebuttal exhibit list</li> <li>• <del>Motions in limine (including motions to strike and Daubert motions)</del></li> </ul> <b>Plaintiff</b> <ul style="list-style-type: none"> <li>• Response to Decertification Motion</li> </ul> <b>Defendants</b> <ul style="list-style-type: none"> <li>• Redline to jury instructions</li> <li>• Response to jurisdiction statement</li> </ul>
April <del>19</del> <u>5</u> , 2024	<b>Both Parties</b> <ul style="list-style-type: none"> <li>• <del>Motions in limine (excluding expert-related motions)</del></li> </ul> <b>Plaintiff</b> <ul style="list-style-type: none"> <li>• <del>Serve updated expert report</del> <u>Trial Memorandum for parties to evaluate disagreements regarding governing law</u></li> </ul>
<u>April 26, 2024</u>	<b>Both Parties</b> <ul style="list-style-type: none"> <li>• <u>Objections to deposition cross-designations</u></li> <li>• <u>Objections to rebuttal exhibit list</u></li> </ul> <b>Defendants</b> <ul style="list-style-type: none"> <li>• <u>Decertification Reply</u></li> <li>• <u>File Decertification Motion</u></li> </ul>
<del>April 12</del> <u>May 17</u> , 2024	<b>Both Parties</b> <ul style="list-style-type: none"> <li>• <del>Responses to motions in limine (including excluding expert-related motions to strike and Daubert motions)</del></li> <li>• <del>Objections to deposition cross-designations</del></li> <li>• <u>Objections to rebuttal exhibit list</u></li> </ul>
<u>May 24, 2024</u>	<b>Both Parties</b> <ul style="list-style-type: none"> <li>• <u>Deadline for any further expert depositions</u></li> </ul>
<u>June 7, 2024</u>	<b>Both Parties</b> <ul style="list-style-type: none"> <li>• <u>Replies on MILs</u></li> </ul>

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Date	Activity
<u>June 14, 2024</u>	<b>Both Parties</b> <ul style="list-style-type: none"> <li><u>Daubert and other expert-related MILs</u></li> </ul>
<u>June 28, 2024</u>	<b>Both Parties</b> <ul style="list-style-type: none"> <li><u>Trial memorandum for parties to evaluate disagreements regarding governing law</u></li> </ul>
<u>July 3, 2024</u>	<b>Both Parties</b> <ul style="list-style-type: none"> <li><u>Opposition to Daubert and other expert-related MILs</u></li> </ul>
<del>April 17</del> <u>July 12</u> , 2024	<b>Plaintiff</b> <ul style="list-style-type: none"> <li>Draft of the Pretrial Order</li> </ul>
<del>April 19</del> , 2024	<b>Defendants</b> <ul style="list-style-type: none"> <li><del>Decertification Reply</del></li> <li><del>File Decertification Motion</del></li> </ul>
<del>April 22</del> <u>July 19</u> , 2024	<b>Defendants</b> <ul style="list-style-type: none"> <li>Revisions/additions to the Pretrial Order</li> </ul>
<del>April 24</del> <u>July 23</u> , 2024	<del>Defendants</del> <b>Both Parties</b> (For filing with the Pretrial Order): <ul style="list-style-type: none"> <li>Revisions to trial memorandum</li> <li>Statement of damages claimed or other relief sought (if any)</li> </ul>
<del>April</del> <u>July</u> 26, 2024	<b>Plaintiff</b> <ul style="list-style-type: none"> <li>File the Pretrial Order</li> </ul> <b>Both Parties</b> <ul style="list-style-type: none"> <li>Submit copies of respective exhibits to Court per Individual Rules</li> <li>Replies on <u>Daubert and expert-related</u> motions in limine (<del>including motions to strike and Daubert motions</del>)</li> <li>File motions in limine (including motions to strike and <i>Daubert</i> motions)</li> </ul>

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# EXHIBIT 2

**From:** [Diane Wizig](#)  
**To:** [Ethan Roman](#); [Matt Matthews](#); [Netra Sreeprakash](#)  
**Cc:** [Burkett McInturff](#); [Steven Wittels](#); [Andrey Belenky](#)  
**Subject:** Re: Mirkin v. XOOM - 3.26 Meet & Confer  
**Date:** Tuesday, March 26, 2024 2:41:35 PM  
**Attachments:** [image001.png](#)  
[\[MH 3.26\] Mirkin v. Xoom - Pretrial Schedule - Final.docx](#)

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Ethan and Burkett,

Attached is a new draft schedule that gives you the requested courtesy extensions of an extra week for decertification briefing and a few additional weeks on the pretrial order deadlines. As discussed, however, we can't agree to your proposed supplemental expert report because it would not only update the existing damage model to account for new data but also would include a new methodology and opinions not previously disclosed, which would seriously prejudice XOOM at this late stage.

If this schedule looks acceptable to you, please put together a letter to the court for our review that seeks only the two extensions that need court approval: decertification briefing and the pretrial order. Or if you want to have a call to discuss, we are available to talk at 4 ET using the call-in number from earlier.

Thanks,

**Diane S. Wizig**  
Partner  
[McDowell Hetherington LLP](#)  
P: 713-333-5889 F: 713-337-8850

**CONFIDENTIALITY NOTICE**

The information in this e-mail may be confidential and/or privileged. This e-mail is intended to be reviewed by only the individual or organization named above. If you are not the intended recipient or an authorized representative of the intended recipient, you are hereby notified that any review, dissemination or copying of this e-mail and its attachments, if any, or the information contained herein is prohibited. If you have received this e-mail in error, please immediately notify the sender by return e-mail and delete this e-mail from your system.

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**From:** Ethan Roman <edr@wittelslaw.com>  
**Date:** Tuesday, March 26, 2024 at 9:04 AM  
**To:** Diane Wizig <diane.wizig@mhllp.com>, Matt Matthews <matt.matthews@mhllp.com>, Netra Sreeprakash <netra.sreeprakash@mhllp.com>  
**Cc:** Burkett McInturff <jbm@wittelslaw.com>, Steven Wittels <slw@wittelslaw.com>, Andrey Belenky <abelenky@kblit.com>  
**Subject:** Mirkin v. XOOM - 3.26 Meet & Confer

Diane & Matt –

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Participant Access: 094-032-726

Best,  
Ethan

**Ethan D. Roman**

WMP | Senior Associate

305 Broadway, 7th Floor | New York, NY 10007

Phone: 914 775 8862 x106

**Wittels  
McInturff  
Palikovic**

# EXHIBIT 3

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 SUSANNA MIRKIN and BORIS MIRKIN,  
4 Individually and on Behalf of All Others  
5 Similarly Situated,  
6 Plaintiffs,

7 vs. No. 18 Civ. 2949 (ARR) (RER)  
8 XOOM ENERGY, LLC and XOOM ENERGY  
9 NEW YORK, LLC,  
10 Defendants.

11 -----X

12

13

14 VIDEOTAPED DEPOSITION OF  
15 SEABRON ADAMSON

16 Tuesday, November 8, 2022

17 10:06 a.m.

18 Veritext

19 101 Arch Street

20 Boston, Massachusetts 02110

21

22

23

24 Laurie K. Langer, RPR

<p>1 Q. And so I'm not at this point even arguing with 2 you about it. I just want to understand it. 3 A. Uh-huh. 4 Q. You've said that under Model 1 -- 5 A. Right. 6 Q. -- anything above, -- 7 A. Uh-huh. 8 Q. -- anything charged by XOOM above the supply 9 costs reported in the rate setting workbook is a damage; 10 right? 11 A. Yes. 12 Q. And that -- under that model -- 13 A. Uh-huh. 14 Q. -- for those customers who were charged variable 15 rates by XOOM over the relative time period, XOOM would 16 lose money -- 17 MR. WITTELS: Objection. 18 Q. -- for those customers in that contract language? 19 MR. WITTELS: Asked and answered. 20 Objection. 21 A. Possibly. I don't think that's the question in 22 front of us. As I said, I mean, the question is 23 consistency with the contractual language. 24 Q. Right.</p> <p style="text-align: right;">Page 86</p>	<p>1 this information back that we made the calculation on 2 around their costs. 3 Q. Let me see if I can go at it a different way. 4 Model 1 in your opinion accurately measures the 5 damages -- 6 A. Uh-huh. 7 Q. -- flowing from what you believe is XOOM's 8 failure to set variable rates consistent with the 9 contract language? 10 A. Yes. 11 Q. And let's see. Paragraph 72 to your report. 12 A. Just give me one second to flip to the page. 13 MR. WITTELS: 72? 14 A. Uh-huh. Okay. 15 Q. Calculates the difference between XOOM's reported 16 supply costs and the rate that the regulated utility 17 charged; correct? 18 A. No. I don't think you said that right. 19 Q. Okay. What -- what does that calculate in 20 paragraph 72? 21 A. Well, the second sentence talks about XOOM's 22 total costs and the thing we just discussed; right? 23 As we -- as I indicate here we also did a, you 24 know, just a kind of a crosscheck calculation to see if</p> <p style="text-align: right;">Page 88</p>
<p>1 A. You said -- as you said yourself, they provided 2 their supply costs. What's the difference with supply 3 costs? 4 Q. I -- I don't know why this is difficult. Like, 5 the calculation isn't even difficult. I'm bad at math 6 and I can do this one. It's anything above the reported 7 supply cost is a damage under Model 1; -- 8 A. Yes. 9 Q. -- correct? 10 A. Yes. 11 Q. Even if anything above that reported supply cost 12 included certain fixed costs, that if they weren't 13 reported in the rate setting workbooks it is a damage 14 under Model 1? 15 MR. WITTELS: Objection. 16 A. That is how the calculus -- that's how the 17 calculations go through, because that's how XOOM 18 reported its total costs, yes. 19 Q. And that is because your reading of the contract 20 is that XOOM can charge no more than the reported total 21 costs? 22 A. Since we went through this morning, it depends on 23 how you read supply costs. I read supply costs as, you 24 know, costs directly related to supply. XOOM reported</p> <p style="text-align: right;">Page 87</p>	<p>1 it's in the same, you know, in the same order of 2 magnitude and just crosschecked it again to what XOOM 3 had reported the applicable utility rates to be. You 4 know, they're generally similar. So if you were to take 5 the deltas, not against XOOM's total cost but against 6 the utility rates, then you get 49 million, not 55 7 million. 8 Q. How is that different from what I asked? 9 A. You said, as I remember, this compares the, the 10 total cost to the -- I'm not exactly sure what you said, 11 but I think it had some consistency with that. If you 12 want to read it back. 13 Q. It's okay. The first sentence of 72 -- 14 A. Uh-huh. 15 Q. -- calculates the difference between XOOM's 16 reported supply costs -- 17 A. Uh-huh. 18 Q. -- and the rate that the utility charged? 19 A. Yes. 20 Q. Okay. And the utility in New York is required to 21 be profit neutral; right? 22 A. Well, you -- the utilities in New York are 23 actually investor owned, most of them are investor owned 24 utilities, so they're not, they are not nonprofit</p> <p style="text-align: right;">Page 89</p>

<p>1 rate that is consistent with the costs plus an 2 appropriate margin, but in this case your opinion that, 3 is that based on actual and estimated supply costs does 4 not allow for recovery of an appropriate margin? 5 A. Okay. Well, I mean, obviously those are two very 6 different wordings. Right? I mean, here we have a 7 very -- in this particular case, with the Mirkins, we 8 have this specific contractual language around supply 9 costs, which as I remember wasn't -- that actual and 10 estimated supply costs and the examples of direct supply 11 costs were not in that contractual language; correct? 12 As you just read out. 13 Here we have this very specific contractual 14 language which, you know, as I said, my first, my first 15 reading of that is, you know, what it says, "specific 16 actual and estimated supply costs." 17 So, you know, as we saw in the report, if the 18 Court were to find that that phrase should be 19 interpreted to mean having a margin, we, we produced the 20 second model with a margin. But, you know, that's 21 really kind of for the Court, in my mind, to determine. 22 You know, my first read is supply costs are pretty 23 narrowly defined as supply costs. It doesn't include 24 marketing costs, for example, that you mentioned. So,</p> <p>Page 94</p>	<p>1 Q. Okay. 2 A. I don't mean construction in a legal sense, I 3 mean just the wording is different; right? I mean, the 4 pricing provisions are different. 5 Q. The words are not exactly the same, I will agree 6 with you on that. 7 A. Well, and in my mind the economic meaning of the 8 words is not the same. Clearly the words are not the 9 same. It's not the same words on the page on the left 10 and the right. But to me, I mean, I -- I interpret the 11 meaning of those to be somewhat different. 12 Q. I can tell. 13 A. Uh-huh. 14 Q. But neither one referenced margin or profit; 15 right? 16 A. No. 17 Q. Okay. All right. Model 2. 18 A. Okay. 19 Q. Let's look at where that begins. 20 A. Page 23. 21 Q. So Model 2 in plain terms is like Model 1 except 22 that you also factored in the margin that XOOM charged 23 its fixed rate customers; right? 24 A. Yeah, in broad terms, yes.</p> <p>Page 96</p>
<p>1 you know, that's why Model 1 went with, went with supply 2 costs. 3 Q. Okay. In the contract language here, one of the 4 reasons that you have opined -- 5 A. Uh-huh. 6 Q. -- that XOOM has constrained its -- 7 A. Uh-huh. 8 Q. -- supply costs is that the contract language 9 doesn't reference margin; right? 10 A. Uh-huh. 11 Q. But the Richards -- 12 MR. WITTELS: You have to say -- you have to 13 say, "yes." You can't say, "uh-huh." 14 A. I'm sorry. I think, yes. 15 Q. But the Richards contract language, based on 16 business and market conditions, didn't reference margin 17 either; right? 18 A. No. But it also doesn't have the specific 19 construction here. 20 Q. Okay. Are -- are you now prepared to provide 21 contract interpretation? 22 A. No. But I'm just saying it doesn't have the same 23 word. I mean, it doesn't -- it doesn't work the same 24 way.</p> <p>Page 95</p>	<p>1 Q. Okay. And that's essentially the damage model 2 used in the Richards case; right? 3 MR. WITTELS: Objection. 4 A. I don't exactly remember how that one, that one 5 worked. That was maybe, like, seven or eight years ago. 6 But I'm -- so I'll -- I won't say I remember 7 specifically how the model worked there. 8 Q. Okay. You -- are you offering the opinion that 9 it's inappropriate for XOOM to seek a higher margin for 10 variable rates than it does for fixed rates? 11 A. That that -- the -- you know, with the assumption 12 of the margin, so, I mean, everything we're predicated 13 here is on the assumption of the applicability of the 14 margin under this specific contract. I -- we need a 15 reasonable margin to charge. 16 We used the fixed rate margin as, you know, 17 indicative of a rate that, a margin that XOOM itself had 18 charged in the same months, in the same periods, blah, 19 blah, blah, all being equal, and as, as an indicator of 20 what a reasonable margin might be. 21 Q. Okay. And are you offering an opinion in this 22 case that it would be unreasonable for XOOM to target a 23 higher margin on its variable rates than it does on its 24 fixed rates?</p> <p>Page 97</p>

1 their retail business.  
2 Q. Okay. Well, I guess --  
3 A. For example, a bunch of the Texas companies have  
4 retail supply businesses. We did a little bit on that,  
5 but not a major thing. But a bunch of the Texas  
6 companies had retail supply businesses that also had  
7 substantial other businesses.  
8 Q. I think I understand what you're saying. And you  
9 didn't work for the retail side of their businesses, you  
10 worked for the other side of their businesses?  
11 A. Or sometimes we would be hired on some kind of  
12 corporate strategy type engagement, which might be  
13 pretty broad.  
14 Q. Got it. Okay. I thank you for your time and  
15 your patience with me.  
16 MR. MATTHEWS: I'll pass the witness.  
17 A. Thank you.  
18 Q. Yes, sir.  
19  
20 EXAMINATION  
21  
22 BY MR. WITTELS:  
23 Q. Mr. Adamson, I just really have one question for  
24 you. You were asked by counsel for XOOM about whether

Page 138

1 the company was able to make any profits on its fixed  
2 rate customers; do you remember that question?  
3 A. Yeah. Not in exact wording, but I remember the  
4 question.  
5 Q. Yeah. And did you ask me to, whether you could  
6 go back and review your report when we had a break?  
7 A. Yeah, well -- yes, we were discussing the report.  
8 Q. And did you reread paragraph 57?  
9 A. Yes.  
10 Q. And does that answer the question of whether XOOM  
11 made money and was profitable on its fixed rate  
12 customers?  
13 MR. MATTHEWS: Objection. Leading.  
14 A. Well, I just -- it just reminded me there was  
15 a -- I had said that there was not a specific P&L, this  
16 was a reference in the report to deposition testimony  
17 from a XOOM witness about the profitability of this.  
18 Q. And what did your report find and state?  
19 A. I don't remember exactly how he worded it. I  
20 think there had been a, in the deposition there was a  
21 question about, it was around, I don't have the  
22 transcript in front of me, of course, of the deposition,  
23 but it was something around the line of were -- were a  
24 fixed rate -- were fixed rate customers profitable for

Page 139

1 XOOM or some broad question.  
2 Q. And the answer was?  
3 A. I believe he said yes, they were, they were both  
4 profitable. Both fixed rate and variable rate were  
5 profitable.  
6 Q. Okay. I have no further questions at this time.  
7 Thanks.  
8 MR. MATTHEWS: Thanks very much.  
9 A. Thank you.  
10 VIDEOGRAPHER: The time is 2:39, we are off  
11 the record.  
12 COURT REPORTER: And, Mr. Matthews, your  
13 order?  
14 MR. MATTHEWS: My order is an expedited  
15 transcript, just, I don't need any print copies.  
16 Electronic only. PDF exhibits.  
17 COURT REPORTER: Expedite by Friday?  
18 MR. MATTHEWS: Yes.  
19 (Whereupon, the deposition concluded at  
20 approximately 2:39 p.m.)  
21  
22  
23  
24

Page 140

1 CERTIFICATE  
2  
3 COMMONWEALTH OF MASSACHUSETTS  
4 SUFFOLK, ss.  
5  
6 I, Laurie Langer, Registered Professional Reporter  
7 and Notary Public in and for the Commonwealth of  
8 Massachusetts, do hereby certify that the witness whose  
9 deposition is hereinbefore set forth, was duly sworn by  
10 me and that such deposition is a true record of the  
11 testimony given by the witness.  
12  
13 I further certify that I am neither related to or  
14 employed by any of the parties in or counsel to this  
15 action, nor am I financially interested in the outcome  
16 of this action.  
17  
18 In witness whereof, I have hereunto set my hand and  
19 seal this 11th day of November, 2022.  
20  
21  
22  
23  
24

Page 141